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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1608

UNITED STATES OF AMERICA, Petitioner

vs.

RAYMOND EUGENE JOHNSON, Respondent

MOTION FOR LEAVE TO

PROCEED

IN FORMA PAUPERIS

JOHN F. WALTER
WALTER, FINESTONE & RICHTER
10850 Wilshire Boulevard
Suite 1075
Los Angeles, California 90024
(213) 475-9755

Attorneys for Respondent

Dated: June 12, 1981

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10850 WILSHIRE BOULEVARD
SUITE 1075 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

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Respondent, Raymond Eugene Johnson, pursuant to U.S. Sup. Ct. Rule 46 and 18 U.S.C. § 3006A(d)(6), requests leave to file the attached Brief In Opposition To Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without pre-payment of costs, and to proceed in forma pauperis. Respondent was represented by appointed counsel pursuant to the Criminal Justice Act of 1964, as amended, in the United States District Court for the central district of Cali-

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fornia and on appeal to the United States Court of Appeals for the Ninth Circuit.

DATED: June 12, 1981.

Respectfully submitted,

JOHN F. WALTER
WALTER, FINESTONE & RICHTER

By _____
John F. Walter
Attorneys for Petitioner

10850 Wilshire Boulevard
Suite 1075
Los Angeles, California 90024

(213) 475-9755

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10850 WILSHIRE BOULEVARD
SUITE 1075 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

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RAYMOND EUGENE JOHNSON, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN F. WALTER
WALTER, FINESTONE & RICHTER
10850 Wilshire Boulevard
Suite 1075
Los Angeles, California 90024
(213) 475-9755

Attorneys for Respondent

Dated: June 12, 1981

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10850 WILSHIRE BOULEVARD
SUITE 1075 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9760

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - ANO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 479-0788

INTRODUCTION

Respondent accepts petitioner's Identification of Question Presented For Review and presentation of the Statement of the Case.

SUMMARY OF ARGUMENT

The issue before the Court is whether the exclusionary rule requiring the suppression of evidence obtained following a non-consensual warrantless entry into respondent's house to arrest him should be applied where the entry occurred prior to this Court's decision in Payton v. New York, 445 U.S. 573 (1980), and the Ninth Circuit's decision in United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978).

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9788

The absence of any conflict between this Court's and lower courts' analysis of the retroactivity of constitutional questions renders petitioner's request for this Court to review the issue without merit. Moreover, the Ninth Circuit Court of Appeals did not err in applying the principles of Payton and Prescott retroactively to this case. Finally, the issue of retroactivity of Payton or Prescott is not appropriately before the Court inasmuch as this case was pending on direct review at the time of the Payton and Prescott decisions. Accordingly, the petition for certiorari should be denied.

ARGUMENT

A. THERE IS NO CONFLICT BETWEEN THIS COURT'S AND LOWER COURTS' ANALYSIS OF THE RETROACTIVE APPLICATION OF FOURTH AMENDMENT PRINCIPLES

Petitioner couches the importance of the Court's review of this case in terms of the Court's interest "to ensure that the courts of appeal employ a sound analytical approach in deciding basic Fourth Amendment questions, including the retroactivity issue presented here." Petition, page 11. In its Supplemental Memorandum, petitioner cites the "growing divergence" between the approach of this Court and the approach of state and lower federal courts in retroactivity decisions as cause for review of this case. In fact, there is no divergence between the approach of the Court and the approach of state and lower federal courts on the issue of retroactivity of Fourth Amendment decisions, and, therefore, certiorari should not be granted.

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

The criteria considered in determining the retroactivity of new constitutional principles are well-established: (a) the purpose to be served by the new standards; (b) the extent of reliance by law enforcement authorities on the old standards; and (c) the effect on the administration of justice of a retroactive application of the new standards. Stovall v. Denno, 388 U.S. 293, 297 (1967); United States v. Peltier, 422 U.S. 531, 534 (1975). If these criteria have been utilized by lower courts in analyzing the retroactivity of new constitutional protections, the lower courts are complying with this Court's mandate and there is no conflict.

In each case cited by petitioner to support the purported growing divergence, the court has in fact based its decision on the criteria set forth in Stovall v. Denno, 388 U.S. 293 (1967) and United States v. Peltier, 422 U.S. 531 (1975), and in each case, as in the instant case, the particular facts of the case accounted for the differing opinions.

For example, in United States v. Dien, 609 F.2d 1038 (2d Cir. 1979) on petition for rehearing, 615 F.2d 10 (1980), the court analyzed the retroactivity of Arkansas v. Sanders, 442 U.S. 753 (1979) pursuant to the standards set forth in United States v. Peltier. 609 F.2d at 1046. Similarly, in United States v. Tucker, 610 F.2d 1007 (2d Cir. 1979), the court applied the three-fold standard in Fourth Amendment exclusionary rule cases as elaborated in United States v. Peltier. 610 F.2d at 1010. Accord, United States v. Madena-Verdugo, 637 F.2d 649, 652 (9th Cir. 1980) and United States v. Ross, 79-1624 (D.C. Cir. 1981) (en banc). As discussed, infra, United States v. Blake, 632 F.2d 731 (9th Cir. 1980) which held that Prescott should be applied retroactively, utilized the Stovall v. Denno approach in deciding the issue. 632 F.2d at 735-736.

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AMS CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9748

The fact that the circuits are consistently holding constitutional principles retroactive does not compel the grant of certiorari herein. The important fact is that in each case the issue was fully analyzed pursuant to the standards of this Court, and, based upon the application of the particular facts to the standards, the principle was held to be retroactive. Contrary to petitioner's argument, the decisions of the circuit courts do not demonstrate a growing divergence in retroactivity decisions but in fact readily establish the lack of necessity for the Court's review of the issue. So long as the lower courts continue to comply with the criteria of the Court in determining retroactivity issues, there is absolutely no basis for the grant of certiorari.

B. THE COURT OF APPEALS' DECISION FOLLOWED SETTLED PRINCIPLES ESTABLISHED BY THIS COURT AND THE NINTH CIRCUIT COURT OF APPEALS

An even more compelling reason for the Court to deny certiorari is that the opinion in this case, relying upon principles common to Prescott and Payton, is in accordance with settled principles and is not erroneous.

Respondent's arrest occurred in May 1977, admittedly prior to this Court's and the Ninth Circuit's recent decisions imposing the warrant requirement on arrests in private premises. However, prior to the filing of the Order revising the Amended Opinion, the Ninth Circuit decided United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978) and expressly held that Prescott should be retroactively applied in United States v. Blake, 632 F.2d 731 (9th Cir. 1980). The Blake decision was premised on an analysis of the criteria for retrospective application of Prescott as set forth in Stovall v. Denno, 388

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U.S. 293 (1967) and the specific application to cases involving exclusionary rules as set forth in Linkletter v. Walker, 381 U.S. 618, 636-637 (1965) and United States v. Peltier, 422 U.S. 531, 535 (1975). Concluding that Prescott should be applied retroactively, the court opined that Prescott did not constitute a sharp break in the law; rather, the result was clearly foreshadowed. The fact that the Ninth Circuit did not have occasion to directly resolve the issue until Prescott should not result in the court's refusal to apply Prescott retroactively.

The prior decisions relied on by the Prescott court clearly support the conclusion that the extended constitutional protection should be given retroactive effect. In United States v. Calhoun, 542 F.2d 1094 (9th Cir. 1976), involving a 1974 arrest, the government conceded that "absent exigent circumstances, the entry [into defendant's apartment] would be illegal." 542 F.2d at 1102. The court then found that there were no exigent circumstances and thus the evidence seized pursuant to the arrest should have been suppressed. 542 F.2d at 1102-1103. Clearly, the government's concession that an arrest warrant was required before the law enforcement officers could enter the apartment signaled a clear awareness of the impending constitutional requirement of an arrest warrant prior to entry into a private dwelling.

Similarly, in United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974), the court considered the warrant requirement where officers entered a private dwelling (commercial building) to effect an arrest. The court analyzed whether the warrantless entry was justified using the criteria established in Dorman v. United States, 435 F.2d 385, 390 (D.C. Cir.

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WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

1979).[1] However, in Phillips, supra, it was unnecessary for the court to decide the arrest warrant issue because the court concluded that the arrest was illegal on the grounds that the agents lacked probable cause to believe that the defendant was in the building. 497 F.2d at 1135-1136.

Prescott and Blake correctly state that Ninth Circuit decisions prior to Prescott clearly and unmistakenly warned law enforcement officers that warrantless arrests in a private dwelling were suspect. Even prior to Prescott, exigent circumstances constituted the only basis that could justify a warrantless arrest inside a home. See United States v. Bustamante-Gamez, 488 F.2d 4, 8 (9th Cir. 1973), cert. denied 416 U.S. 970 (1974); United States v. McLaughlin, 525 F.2d 517, 520 (9th Cir. 1975), cert. denied 427 U.S. 904 (1976); United States v. Flickinger, 573 F.2d 1349, 1354 (9th Cir.), cert. denied 439 U.S. 836 (1978). If such was not the case, the government certainly would not have conceded that the warrantless entry to arrest would be illegal absent exigent circumstances in Calhoun.

It is thus clear that the Ninth Circuit's opinion, relying on Prescott, was correctly decided upon settled principles, and thus further review is not warranted.

Just as the Ninth Circuit correctly applied Prescott to the subject warrantless arrest entry, its retroactive application of Payton was correct. Prior to Payton, the Court had

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1/ Dorman v. United States was the first of a series of court of appeals cases holding that warrantless arrest entries into the home are unconstitutional. See United States v. Reed, 572 F.2d 412 (2d Cir. 1978), cert. denied sub nom. Goldsmith v. United States, 439 U.S. 913; United States v. Killebrew, 560 F.2d 729 (6th Cir. 1977); United States v. Shye, 492 F.2d 886 (6th Cir. 1974); United States v. Houle, 603 F.2d 1297 (8th Cir. 1979); See also United States v. Bradley, 455 F.2d 1181 (1st Cir. 1972) and United States v. Davis, 461 F.2d 1026 (3d Cir. 1972) (assuming without decision the unconstitutionality of warrantless home arrests).

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 479-0788

expressly reserved the issue of the unconstitutionality of a warrantless entry into a home to effect an arrest on a number of occasions. See United States v. Santana, 427 U.S. 38 (1976); id at 45 (Marshall, J., dissenting); United States v. Watson, 423 U.S. 411, 418, n. 6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113, n. 13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971); Jones v. United States, 357 U.S. 493, 499-500 (1958).2/

Indeed, the Court had sanctioned warrantless arrests only in public places, United States v. Watson, 423 U.S. 411 (1976); United States v. Santana, 427 U.S. 38 (1976), and repeatedly emphasized the special sanctity afforded the home. United States v. United States District Court, 407 U.S. 297 (1972), United States v. Martinez-Fuerte, 420 U.S. 542 (1976); Johnson v. United States, 333 U.S. 10 (1948). Surely, the Court's reservation of this issue could not have conceivably granted law enforcement officers carte blanche to make warrantless home arrests in view of the careful analysis of the boundary of public versus private portions of a dwelling in Watson and Santana. Thus, any reliance by law enforcement officers on Watson or Santana on the issue of a warrantless arrest entry into a home was totally unjustified.

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

2/ In Coolidge, the Court stated in dicta that:

> "The notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without warrant are per se unreasonable in the absence of some one of a number of well-defined 'exigent circumstances.'"
> 403 U.S. 477-78.

Contrary to petitioner's argument,[3/] Payton did not mark a sharp break in prior decisions regarding warrantless arrest entries into a home. Although the law was unsettled on this issue, the Court's prior decisions certainly foreshadowed the Payton ruling.

C. A CHANGE IN THE LAW WILL BE GIVEN EFFECT TO A CASE PENDING ON DIRECT REVIEW

It is well settled that a change in the law will be given retroactive effect to a case pending on direct review at the time of the decision. Linkletter v. Walker, 381 U.S. 618, 627 (1965). The principle applies whether or not the new law is expressly made applicable to pending cases. See Thorpe v. Durham Housing Authority, 393 U.S. 268, 281-82 (1969); Bradley v. Richmond School Board, 416 U.S. 696, 711-16 (1974). This principle is unquestionably applicable to the instant case which was pending on direct review at the time of the Payton and Prescott decisions.

Petitioner attempts to undermine the import of Linkletter and its progeny by relying on the decisions in Bowen v. United States, 422 U.S. 916 (1975) and United States v. Peltier, supra, both of which held that Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (prohibiting use of roving border patrols to search vehicles without warrant or probable cause) would not be applied retroactively to searches prior to the decision, even though the cases were pending on direct review at the time of the decision. The reliance on Bowen and

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3/ Petitioner cites the Court's reference to the 'longstanding and widespread practice' of allowing warrantless arrest entries. Petition, page 9. However, the Court referenced state court decisions only and not federal court decisions. 445 U.S. at 600.

WALTER, FINERTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-0788

Peltier in this regard is misplaced in that Bowen and Peltier are exceptions to the general rule of applicability of new principles to cases pending on direct review. Bowen and Peltier were based on the Court's conclusion that "[i]t was in reliance upon a validly enacted statute, supported by long-standing administrative regulations and continuous judicial approval, that border patrol agents stopped and searched." (Emphasis added) Peltier, 422 U.S. at 541.4/ As the Peltier dissent pointedly noted, the analysis was a startling departure from the settled principle established in Linkletter, 422 U.S. at 550-551, and it was not justified notwithstanding the strong reliance by law enforcement officers on the purported long-standing regulations and judicial approval. A fortiorari, in the instant case, a departure from the settled principle is not warranted in view of the absence of any judicial or legislative approval of warrantless arrest entries in a home.

Moreover, in Steagald v. United States, No. 79-6777 (April 21, 1981), the Court expressly relied on Payton to hold a warrantless search prior to the Payton decision to be uncon-

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4/ In Peltier, the Court also distinquished Linkletter by noting that by the time Linkletter was decided, Mapp v. Ohio, 367 U.S. 643 (1961), had already been applied to three cases pending before the Supreme Court on direct review. 422 U.S. 535, n. 5. In this respect, the instant case is closely akin to Linkletter in that since the Payton decision, the Court has vacated judgments in a number of cases (See, e.g., Bush v. Florida, 446 U.S. 902, on remand sub nom. Busch v. United States, 392 So.2d 272 (Fla. Dist. Ct. App. 1980); Brown v. Florida, 446 U.S. 902, on remand 392 So.2d 280 (Fla. Dist. Ct. App. 1980), petition for cert. pending (No. 80-1644, filed March 27, 1981)). Similarly, the Ninth Circuit has repeatedly and correctly applied the principles of Payton and Prescott to cases pending on direct review at the time of the decisions. United States v. Blake, supra; United States v. Stubblefield, 621 F.2d 980 (9th Cir. 1980); United States v. Gray, 626 F.2d 102 (9th Cir. 1980). For other examples of court of appeals decisions applying Payton, see United States v. Velasquez, 626 F.2d 314 (3d Cir. 1980); Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) and Wallace v. King, 626 F.2d 1157 (4th Cir. 1980).

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9788

stitutional. True, the Court did not expressly decide the Payton retroactivity issue. However, the Court's silence with respect to the retroactivity of Payton, coupled with the extension of Fourth Amendment protections in Steagald, is implicit acceptance of Payton's retroactivity, at least with respect to cases pending on direct review.

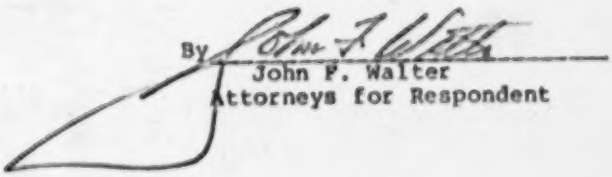
CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied.

DATED: June 12, 1981.

Respectfully submitted,

WALTER, FINESTONE & RICHTER
JOHN F. WALTER

By 
John F. Walter
Attorneys for Respondent

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 475-9755

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the bar of this Court and counsel of record for respondent herein. On this 12th day of June 1981, one copy of the foregoing Motion For Leave To Proceed In Forma Pauperis and Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit was mailed, first class, postage prepaid, at Los Angeles, California as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

Lourdes G. Baird
United States Attorney
1200 United States Courthouse
312 North Spring Street
Los Angeles, California 90012

I certify under penalty of perjury that the foregoing is true and correct and that this Certificate is executed this 12th day of June 1981 at Los Angeles, California.

JOHN F. WALTER

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-9788

CERTIFICATE OF FILING

I hereby certify that I am a member of the bar of this Court and am counsel of record for respondent herein. On June 12, 1981, an original and one copy of a Motion For Leave To Proceed In Forma Pauperis, an original and ten copies of Brief In Opposition To Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit, and an original and one copy of an Appearance Form were deposited in the United States mail at Los Angeles, California, with first class postage prepaid, properly addressed to the Clerk of this Court at United States Supreme Court Building, First Street N.E., Washington, D.C. 20543.

I certify under penalty of perjury that the foregoing is true and correct and that this Certificate Of Filing is dated this 12th day of June 1981 at Los Angeles, California.

JOHN F. WALTER

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Subscribed and sworn to before me this 12th day of June 1981.

OFFICIAL SEAL
SHELLEY E. KILLION
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires July 21, 1981

Notary Public In And For Said
County And State

WALTER, FINESTONE & RICHTER
LAWYERS
A PROFESSIONAL CORPORATION
10880 WILSHIRE BOULEVARD
SUITE 1070 - AVCO CENTER - WESTWOOD
LOS ANGELES, CALIFORNIA 90024
(213) 478-1788